

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

ANTONIO WHEELER,  
Plaintiff,  
v.  
THE STATE OF NEVADA, *et al.*  
Defendants

Case No.: 2:24-cv-00838-GMN-NJK

## **Order and Report and Recommendation**

(Docket Nos. 1, 1-2)

Plaintiff is proceeding in this action *pro se* and has requested authority pursuant to 28 U.S.C. § 1915 to proceed *in forma pauperis*. Docket No. 1.

## I. *In Forma Pauperis* Application

Plaintiff filed an affidavit required by § 1915(a). Docket No. 1. Plaintiff has shown an inability to prepay fees and costs or give security for them. Accordingly, the request to proceed *in forma pauperis* will be granted pursuant to 28 U.S.C. § 1915(a). The Court will now review Plaintiff's complaint.

## **II. Screening the Complaint**

Upon granting an application to proceed *in forma pauperis*, courts additionally screen the complaint pursuant to § 1915(e). Federal courts are given the authority to dismiss a case if the action is legally “frivolous or malicious,” fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). When a court dismisses a complaint under § 1915, the plaintiff should be given leave to amend the complaint with directions as to curing its deficiencies, unless it is clear from the face of the complaint that the deficiencies could not be cured by amendment. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

1 Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a complaint  
 2 for failure to state a claim upon which relief can be granted. Review under Rule 12(b)(6) is  
 3 essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 723  
 4 (9th Cir. 2000). A properly pled complaint must provide a short and plain statement of the claim  
 5 showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v.*  
 6 *Twombly*, 550 U.S. 544, 555 (2007). Although Rule 8 does not require detailed factual allegations,  
 7 it demands “more than labels and conclusions” or a “formulaic recitation of the elements of a cause  
 8 of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*citing Papasan v. Allain*, 478 U.S. 265,  
 9 286 (1986)). The Court must accept as true all well-pled factual allegations contained in the  
 10 complaint, but the same requirement does not apply to legal conclusions. *Iqbal*, 556 U.S. at 679.  
 11 Mere recitals of the elements of a cause of action, supported only by conclusory allegations, do  
 12 not suffice. *Id.* at 678. Secondly, where the claims in the complaint have not crossed the line from  
 13 conceivable to plausible, the complaint should be dismissed. *Twombly*, 550 U.S. at 570.  
 14 Allegations of a *pro se* complaint are held to less stringent standards than formal pleadings drafted  
 15 by lawyers. *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir. 2010) (finding that liberal  
 16 construction of *pro se* pleadings is required after *Twombly* and *Iqbal*).

17       A. Claim 1 – Clark County Commissioners

18       Construing Plaintiff’s complaint liberally, Plaintiff’s first claim alleges that Clark County  
 19 Commissioners (named Defendants Susan Brager, Lawrence L. Brown, III, Chris Giunchigiani,  
 20 Marilyn Kirkpatrick, Mary Beth Scow, Steve Sisolak, and Lawrence Weekly) acted negligently  
 21 and violated his First and Fourth Amendment rights when they enacted Clark Code County  
 22 (“CCC”) § 16.11.070, which prevents obstructive uses of public sidewalks. Docket No. 1-2 at 8.<sup>1</sup>  
 23 However, a negligent act by a person acting under color of state law does not rise to the level of a  
 24 constitutional violation. *Daniels v. Williams*, 474 U.S. 327, 333 (1986). As such, Plaintiff’s  
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26       <sup>1</sup> Though Plaintiff’s complaint asserts 18 U.S.C. § 242 (which institutes criminal penalties for  
 27 depriving a person of their constitutional rights under the color of law) as the basis for his  
 28 constitutional claims, the Court liberally construes his complaint as asserting civil claims pursuant  
 to 42 U.S.C. § 1983.

1 complaint fails to state a colorable claim to the extent that it asserts that the named Clark County  
 2 Commissioners acted negligently in adopting CCC § 16.11.070.

3 Normally, the Court would grant Plaintiff leave to amend. However, the actions of the  
 4 Commissioners in drafting and enacting CCC § 16.11.070 are entitled to legislative immunity. *See*  
 5 *Bogan v. Scott-Harris*, 523 U.S. 44, 55-56 (1998); *Kaahumanu v. Cnty. of Maui*, 315 F.3d 1215,  
 6 1220 (9th Cir. 2003). Thus, amendment would be futile.

7 B. Claim 2- Las Vegas Metropolitan Police Department

8 Plaintiff's second claim asserts that the Las Vegas Metropolitan Police Department  
 9 ("Metro") violated Plaintiff's First and Fourth Amendment rights when Metro officers continually  
 10 enforced CCC § 16.11.070 by issuing Plaintiff citations and by arresting him. Docket No. 1-2 at  
 11 9. Plaintiff does not name any individual officer by name or identify any specific arrest or citation.<sup>2</sup>

12 To impose liability on a municipal entity under § 1983, a plaintiff must show that an  
 13 "action pursuant to official municipal policy" caused their injury." *Connick v. Thompson*, 563  
 14 U.S. 51, 60–61 (2011) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691, 694 (1978)). A  
 15 plaintiff must allege: (1) he possessed a constitutional right of which he was deprived; (2) the  
 16 municipal entity had a policy; (3) this policy amounts to deliberate indifference to plaintiff's  
 17 constitutional right; and, (4) that the policy was the moving force behind the constitutional  
 18 violation. *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996) (quoting *Oviatt By and*  
 19 *Through Waugh v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992)).

20 Prior to *Iqbal*, the Ninth Circuit had a liberal pleading policy with respect to *Monell* claims,  
 21 requiring nothing more than "a bare allegation that government officials' conduct conformed to  
 22 some unidentified government policy or custom." *AE ex rel. Hernandez v. Cnty. of Tulare*, 666  
 23 F.3d 631, 636–37 (9th Cir. 2012). However, district courts "now generally dismiss claims that fail

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25 <sup>2</sup> Plaintiff also names Kevin McMahill as a defendant but makes no allegations involving  
 26 McMahill. Docket No. 1-2 at 6. Municipal officers may be sued in their official capacities, but  
 27 the plaintiff must allege that any constitutional violations occurred as a result of an official policy  
 28 or custom, *Monell*, 436 U.S. at 690. Here, Plaintiff only makes general allegations regarding  
 Metro's policies and no allegations regarding McMahill's role in promulgating those policies.  
 Therefore, the Court recommends dismissing the claims against McMahill without prejudice.

1 to identify the specific content of the municipal entity's alleged policy or custom." *Little v. Gore*,  
 2 148 F. Supp. 3d 936, 957 (S.D. Cal. 2015).

3 In his complaint, Plaintiff does not identify a Metro policy other than a bare allegation that  
 4 officers enforced the law. Docket No. 1-2 at 6, 9. Under *Iqbal*, the court finds Plaintiff's bare  
 5 allegations are insufficient to give fair notice and to enable Metro to defend itself effectively. *See*  
 6 *AE ex rel. Hernandez*, 666 F.3d at 637 (citing *Starr v. Baca*, 652 F.3d 1202 (9th Cir. 2011)). As  
 7 such, Plaintiff fails to state a colorable *Monell* claim against Metro. As a result, Plaintiff's claim  
 8 against Metro is dismissed without prejudice with leave to amend.

9 If he files an amended complaint, Plaintiff must identify a factually specific policy of Metro  
 10 that led to a violation of his constitutional rights. For example, in *Taylor v. Metro*, 2:19-cv-995-  
 11 JCM-NJK, 2019 WL 5839255 at \*15 (D. Nev. Nov. 7, 2019), the court found that plaintiff had  
 12 sufficiently pled a *Monell* claim against Metro for promulgating the policy of "citing street  
 13 performers for obstruction *per se* when they use a table or other object for First Amendment  
 14 expression."

15 C. Claim against the State of Nevada

16 Plaintiff names the State of Nevada as a defendant in his first claim. However, Plaintiff  
 17 fails to state a colorable claim against Nevada. Plaintiff neither identifies any action taken by  
 18 Nevada nor makes any factual allegation involving Nevada. It appears that Plaintiff misconstrues  
 19 CCC § 16.11.070 as a state law rather than a county ordinance.

20 Even if Plaintiff made factual allegations regarding the State of Nevada, the Court would  
 21 be required to dismiss those claims with prejudice without leave to amend, because amendment  
 22 would be futile. *See Brooks v. Sulphur Springs Valley Elec. Co-op.*, 951 F.2d 1050, 1053 (9th Cir.  
 23 1991) (holding that "[t]he Eleventh Amendment prohibits federal courts from hearing suits brought  
 24 against an unconsenting state" and that "[t]he Eleventh Amendment's jurisdictional bar covers  
 25 suits naming state agencies and departments as defendants, and applies whether the relief sought  
 26 is legal or equitable in nature"); *see also Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65  
 27 (1989) (holding that states are not persons for purposes of § 1983); *see* NRS § 41.031(3) (stating  
 28 that the State of Nevada does not waive its Eleventh Amendment immunity).

1 **III. Conclusion**

2 Accordingly, **IT IS ORDERED** that:

3 1. Plaintiff's request to proceed *in forma pauperis* (Docket No. 1) is **GRANTED**.  
4 Plaintiff is not required to pay the filing fee of four hundred five dollars (\$405). Plaintiff  
5 is permitted to maintain this action to conclusion without the necessity of prepayment  
6 of any additional fees or costs or the giving of a security therefor. This order granting  
7 leave to proceed *in forma pauperis* shall not extend to the issuance and/or service of  
8 subpoenas at government expense.

9 2. The Clerk's Office is **INSTRUCTED** to file Plaintiff's complaint (Docket No. 1-2) on  
10 the docket.

11 3. Plaintiff's complaint is **DISMISSED** with leave to amend. Plaintiff will have until  
12 **September 20, 2024**, to file an amended complaint, if the noted deficiencies can be  
13 corrected. If Plaintiff fails to file an amended complaint, the Court will recommend  
14 that his complaint be dismissed. If Plaintiff chooses to amend the complaint, Plaintiff  
15 is informed that the Court cannot refer to a prior pleading (i.e., the original complaint)  
16 in order to make the amended complaint complete. This is because, as a general rule,  
17 an amended complaint supersedes the original complaint. Local Rule 15-1(a) requires  
18 that an amended complaint be complete in itself without reference to any prior  
19 pleading. Once a plaintiff files an amended complaint, the original complaint no longer  
20 serves any function in the case. Therefore, in an amended complaint, as in an original  
21 complaint, each claim and the involvement of each Defendant must be sufficiently  
22 alleged. **Failure to comply with this order may result in dismissal of this case.**

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4. Further, IT IS RECOMMENDED that the claims against the Clark County Commissioners, Kevin McMahill, and the State of Nevada be DISMISSED without leave to amend.

## IT IS SO ORDERED.

Dated: August 22, 2024

Nancy J. Koppe  
United States Magistrate Judge

## NOTICE

This report and recommendation is submitted to the United States District Judge assigned to this case pursuant to 28 U.S.C. § 636(b)(1). A party who objects to this report and recommendation must file a written objection supported by points and authorities within fourteen days of being served with this report and recommendation. Local Rule IB 3-2(a). Failure to file a timely objection may waive the right to appeal the district court's order. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991).